SERVED: December 5, 2006

NTSB Order No. EA-5262

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 1st day of December, 2006

MARION C. BLAKEY, Administrator, Federal Aviation Administration, Complainant, v. DOUGLAS R. ZINK, Respondent.	)	Docket SE-17414

OPINION AND ORDER

Respondent appeals the oral initial decision and order of Administrative Law Judge Patrick G. Geraghty in this matter, issued January 11, 2006.[1] By that decision, the law judge affirmed the Administrator's Order of Suspension for violations

[1] The initial decision, an excerpt from the hearing transcript, is attached.

of 14 C.F.R. §§ 91.7(a) and (b),[2] 91.13(a),[3] 91.213(a)(4),[4] and 121.563,[5] and imposed a 140-day suspension against respondent's airline transport pilot certificate.[6] We deny respondent's appeal.

The Administrator's complaint alleged that respondent, operating an Airbus A-319 for Frontier Airlines from Denver, Colorado, became aware that, upon landing at Washington, D.C., the number 2 engine thrust reverser did not deploy. Instead of entering the mechanical irregularity in the maintenance log of the aircraft, the complaint alleges that respondent flew the

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[2] Section 91.7(a) restricts operation of a civil aircraft unless the aircraft "is in an airworthy condition." Section 91.7(b) states that the pilot in command of a civil aircraft is responsible for determining whether that aircraft is in condition for safe flight, and must discontinue the flight "when unairworthy mechanical, electrical, or structural conditions occur."

[3] Section 91.13(a) states that, "[n]o person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

[4] Section 91.213(a)(4) prohibits an airman from taking off in an aircraft with inoperative instruments or equipment installed without including an entry in the aircraft's records describing the inoperable instruments and equipment.

[5] Section 121.563 requires pilots in command to enter all mechanical irregularities occurring during flight time in the maintenance log of the airplane at the end of the flight time.

[6] The Administrator's complaint also alleged a violation of 14 C.F.R. § 121.535(f). However, the Administrator withdrew this allegation at the hearing, and the law judge reduced the 180-day suspension that the Administrator originally sought to a 140-day suspension. We do not consider the § 121.535(f) charge in our analysis. The Administrator does not appeal the sanction modification.

aircraft back to Denver and did not contact the Maintenance Control Office of Frontier Airlines as Frontier's Flight Operations Manual requires. In addition, the complaint alleges that, upon landing in Denver, the number 2 engine thrust reverser again failed to deploy.

After respondent answered the Administrator's complaint (denying all alleged violations and claiming several affirmative defenses), the Administrator served a discovery request that included a Request for Admissions of the key allegations in the complaint. Upon not receiving a substantive reply to this discovery request,[7] the Administrator's counsel sent a letter directly to respondent reminding respondent of his continuing obligation to comply with discovery. See Complainant's Mot. to Compel Discovery and Mot. to Deem Certain of Complainant's Requests for Admis. as Admitted at Exh. 6. In the absence of a response, the Administrator's counsel filed a motion to compel

[7] On August 30, 2005, respondent provided the following response to Request for Admission Nos. 2 and 10: "[h]aving made reasonable inquiry, respondent is without knowledge or readily obtainable information sufficient to enable him to admit or deny [this] Request for Admission." Resp. to Complainant's Initial Disc. Requests at 6. Respondent disputed the term "mechanical irregularity" in Request for Admission Nos. 14 and 15, and stated that the "referenced material best speaks for itself" in response to Request for Admission Nos. 16 and 18. In addition, respondent provided the following response to Request for Admission No. 17: "[o]bjects to Request for Admission No. 17 on the grounds that it is not relevant or reasonably calculated to lead to the discovery of admissible evidence. Moreover, it is highly prejudicial, and devoid of probative value." Id. at 8-9.

discovery from respondent and to deem certain portions of the Administrator's Request for Admissions admitted. As a result of respondent's lack of adequate responses, the law judge ordered respondent to comply with the discovery requests, and deemed Request for Admission Nos. 2, 10, and 14-18 as admitted. The allegations in Request for Admission Nos. 2, 10, and 14-18 were as follows:

> REQUEST FOR ADMISSION NO. 2. Admit that on July 2, 2004, during the landing roll at Reagan National Airport, Washington, D.C., the thrust reverser to Engine Number 2 did not deploy.
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> REQUEST FOR ADMISSION NO. 10. Admit that on July 2, 2004, during the landing roll of Frontier Airlines Flight #419 at Denver, Colorado, the thrust reverser to Engine Number 2 did not deploy.
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> REQUEST FOR ADMISSION NO. 14. Admit that the failure of an A-319 thrust reverser to deploy during landing constitutes a mechanical irregularity.
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> REQUEST FOR ADMISSION NO. 15. Admit that a cockpit indicator light warning of the failure of an A-319 thrust reverser to deploy during landing constitutes a mechanical irregularity.
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> REQUEST FOR ADMISSION NO. 16. Admit that Frontier Airline's Flight Operations Manual, Volume 1 … provides [that] … [a]ll mechanical irregularities occurring during flight time must be entered in the Aircraft Log Book … [and requires that] Maintenance Control … verify the entry in the logbook and [respond to the irregularity].
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> REQUEST FOR ADMISSION NO. 17. Admit that in October 2002, Captain Zink's Airline Transport Pilot certificate was suspended for a period of thirteen days for refusing to give an Aviation Safety Inspector free and uninterrupted access to the pilot's compartment in the aircraft on September 14, 2001.

> REQUEST FOR ADMISSION NO. 18. Admit that Frontier's Flight Operations Manual, volume II, requires the pilot in the cockpit that is not conducting the landing, after touchdown, to confirm the upper ECAM N1 indicates REV in green and to make the call out "REVERSE GREEN" or "ONE GREEN" or "NO GREEN" as applicable.

Shortly after the law judge issued the order deeming these allegations referenced in the Administrator's Request for Admissions as admitted, the Administrator filed a motion for partial summary judgment pursuant to 49 C.F.R. § 821.17(d). The law judge granted the Administrator's motion and the matter proceeded to a hearing, at which the law judge heard arguments regarding sanction.

Respondent argues that the law judge's findings do not support his order granting the Administrator's motion for partial summary judgment,[8] the law judge abused his discretion by granting summary judgment and limiting the hearing to the sanction issue, and that the Administrator did not provide respondent with an opportunity to attend a conference in

[8] We addressed this issue regarding respondent's lack of meaningful response to the Administrator's request for admissions in Administrator v. Zink, NTSB Order No. EA-5249 (2006), wherein we held that the law judge's order deeming the Administrator's request for admissions as admitted was appropriate, and that summary judgment was therefore proper because no genuine issue of material fact existed in light of the law judge's order concerning the request for admissions. Id. at 4-5. Respondent has not presented any persuasive arguments for abandoning that rationale here.

accordance with 49 U.S.C. § 44709(c).[9] Respondent also argues that he cannot explain his previous counsel's ambiguous responses to the Administrator's Request for Admissions, and argues that he obtained new counsel after the law judge entered his order deeming the relevant allegations in the Request for Admissions to have been admitted.

The Administrator argues that the Administrator's Request for Admissions addressed all of the allegations at issue in the complaint, and that, upon the law judge's order deeming the allegations addressed in the Request for Admissions as admitted, no genuine, material issue of fact existed. The Administrator also argues that respondent waived his opportunity to attend an informal conference pursuant to 49 U.S.C. § 44709(c), and references exhibits showing that the Administrator's counsel provided multiple opportunities to respondent to discuss the case in an informal conference.

We have long recognized that law judges, in general, have significant discretion in overseeing discovery. See 49 C.F.R. §§ 821.19(b), 821.35(b); see also Administrator v. Evans, NTSB Order No. EA-4298 at 2 (1994) (citing Administrator v. Wagner, NTSB Order No. EA-4081 (1994), and stating that, "[t]he

[9] Title 49 U.S.C. § 44709(c) requires the Administrator to provide the certificate-holder with "an opportunity to answer the charges and be heard why the certificate should not be amended, modified, suspended, or revoked."

sufficiency of discovery responses is a matter committed to the discretion of our law judges.”). Where a party does not comply with discovery requests in accordance with 49 C.F.R. § 821.19, the law judge has the discretion to impose sanctions.[10] See, e.g., Administrator v. Moore, NTSB Order No. EA-4992 at 2 (2002); Administrator v. Bailey & Avila, NTSB Order No. EA-4294 at 3 (1994). Here, respondent did not reply to the Administrator’s Motion to Compel or otherwise modify or further explain his earlier responses to the Administrator’s Request for Admissions. Under these circumstances, an order deeming deficient responses to a Request for Admissions as admitted, after opportunities to respond and counter the allegations in

[10] We note that respondent had several opportunities after the Administrator filed her Request for Admissions to avoid the law judge’s discovery sanction order that deemed critical facts admitted. Respondent could have, for example, responded to the Administrator’s counsel’s September 9, 2005 letter, in which counsel reminded respondent of his obligation to comply with discovery and informed him that the Administrator intended to file a motion to compel. In addition, respondent could have responded to the Administrator’s motion to compel and to deem facts admitted, and disavowed his attorney’s earlier, inadequate response. Respondent did not respond to the Administrator’s discovery request after any such opportunities. While we acknowledge that respondent temporarily proceeded without counsel, we note that such a situation does not obviate a respondent’s obligations with regard to discovery or responses in general in a pending enforcement action. See Administrator v. Casino Airlines, Inc., NTSB Order No. EA-5091 at 1 (2004), aff’d 439 F.3d 715, 718 (D.C. Cir. 2006).

the Request for Admissions as described above, is neither an abuse of discretion nor an inappropriate sanction.[11]

A party may file a motion for summary judgment on the basis that the pleadings and other supporting documents establish that no material issues of fact exist, and that the party is therefore entitled to judgment as a matter of law. 49 C.F.R. § 821.17(d). We have previously considered the Federal Rules of Civil Procedure to be instructive in determining whether disposition of a case via summary judgment is appropriate. Administrator v. Doll, 7 NTSB 1294, 1297 n.14 (1991) (citing Fed. R. Civ. P. 56(e)). In this regard, we recognize that federal courts have granted summary judgment when no genuine issue of material fact exists. Celotex Corp. v. Catrett, 477 U.S. 317, 322-24 (1986).[12] In the case at issue, given

[11] See Fed. R. Civ. P. 36. We note that the law judge did not elaborate at length on his reasons for determining that respondent's responses to the Administrator's Request for Admissions were inadequate. However, respondent failed to respond when given clear notice of perceived deficiencies in his discovery responses, and, even now on appeal, does not provide us with a sufficient basis on which to decide that the law judge's decision to grant the Administrator's Motion to Compel was clearly erroneous or arbitrary. This shortcoming, combined with the fact that the Board has long afforded law judges significant discretion in overseeing discovery issues, reinforces our unwillingness to overturn the law judge's decisions with regard to the Motion to Compel.

[12] An issue is *genuine* if the evidence is sufficient for a reasonable fact-finder to return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255-56 (1986). An issue is *material* when it is relevant or necessary to the ultimate conclusion of the case. Id. at 248.

respondent's lack of meaningful response to the Administrator's Request for Admissions, and the law judge's subsequent order deeming the essentially uncontested requests for admission admitted, no genuine issue of material fact exists. Therefore, the law judge properly granted summary judgment regarding the germane regulatory violations.

Respondent also argues that it was prejudicial error for the law judge to "refuse to allow respondent to present a complete case in support of mitigation at the hearing." Resp't Br. at 9. Respondent's appeal brief, however, provides little support for this argument, and our review of the transcript of the hearing reveals no error. Respondent appears to indicate that he self-reported the incident, but does not articulate any details regarding this alleged reporting, nor did he proffer any evidence or exhibits to support his argument that mitigation would have been appropriate. Under these circumstances, and on this record, we cannot hold that the law judge erred in his sanction determination or in his exercise of proper control over the hearing.

Finally, we conclude that the Administrator provided respondent with the requisite opportunity for an informal conference in accordance with 49 U.S.C. § 44709(c). We note, initially, that respondent appears to have waived this argument because he did not raise it at an appropriate time before the

law judge. The Administrator cites respondent's companion case, Administrator v. Zink, NTSB Order No. EA-5249 (2006), wherein we held that the record indicated that the Administrator's counsel had provided respondent with an opportunity to attend an informal conference in accordance with 49 U.S.C. § 44709(c). A review of that record confirms that the Administrator provided respondent an opportunity to attend a conference to discuss both the allegations at issue here (FAA Case No. 2004NM030154), and the allegations that were the subject of Zink, supra (FAA Case No. 2004NM030184). See Response to Resp't Opp'n to Mot. for Summ. J., Exhs. 3, 4, and 7 in Zink, supra (correspondence regarding informal conference for FAA Case Nos. 2004NM030154 and 2004NM030184). Respondent does not provide any contrary evidence to indicate that the Administrator failed to provide him with an opportunity to attend a conference to discuss the Administrator's allegations. Finally, even if respondent did not waive this argument, respondent appears to interpret 49 U.S.C. § 44709(c) as establishing an unqualified right to attend a conference, which should be held at the respondent's convenience. We have held that § 44709(c) confers a right to an *opportunity* to attend such a conference, but not an unqualified *right*. FAA v. Windwalker, NTSB Order No. EA-4638 (1998) (stating that, "[t]here is … evidence in the record that the opportunity for a conference was continually made available to

respondent, who failed to take advantage of it. The law does not require more.").

In sum, respondent demonstrates no error in the law judge's order, and, therefore, we conclude that the public interest and air safety requires affirmation of the law judge's initial decision.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The law judge's initial decision is affirmed; and

3. The 140-day suspension of respondent's airline transport pilot certificate shall begin 30 days after the service date indicated on this opinion and order.[13]

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN and HIGGINS, Members of the Board, concurred in the above opinion and order.

[13] For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. § 61.19(g).